In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 284

ISAAC JACK BARBER, *Petitioner*

v.

UNITED STATES OF AMERICA

On Motion to Proceed With Typewritten Record and on Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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MEMORANDUM FOR THE RESPONDENT IN OPPOSITION TO THE GRANTING OF THE PETITION FOR A WRIT OF CERTIORARI

Petitioner was tried and convicted in the United States District Court for the Eastern District of Oklahoma under an indictment charging entry into a bank, insured by the Federal Deposit Insurance Corporation, with the intent to commit larceny therein, in violation of 12 U.S.C. [1946 ed.] 588b. On March 10, 1948, he was sentenced to five years' imprisonment and later incarcerated in

the United States Penitentiary at Leavenworth, Kansas. (R. 13.)

A motion to vacate the judgment and sentence was filed on January 30, 1952, pursuant to 28 U.S.C. 2255, alleging that petitioner's conviction was illegal because there had been wrongfully introduced in evidence, over his attorney's objection on his trial, a pair of shoes seized by an F.B.I. agent who entered petitioner's home against his will without a search warrant (R. 4-5). The Government filed a motion to dismiss petitioner's motion on the ground that petitioner was raising a question as to the admissibility of certain evidence, which should have been advanced on direct appeal rather than on a 2255 motion (R. 6). On March 7, 1952, the sentencing judge denied the motion on the ground that petitioner presented no grounds warranting relief (R. 7).

On appeal (R. 8) the Court of Appeals for the Tenth Circuit, on June 11, 1952, unanimously affirmed the sentencing judge's ruling (197 F. 2d 815). It held that, even if it were conceded arguendo that the shoes were erroneously admitted in evidence, that was at most a trial error which could be challenged only by an appeal from the judgment of conviction, and not for the first time under a 2255 motion. (R. 11-13.) Petitioner's petition for certiorari, filed August 18, 1952, renews his contention that he was entitled to review on the question of the inadmissibility of the

evidence by reason of an alleged illegal search and seizure violative of the Fourth Amendment.

The authorities clearly support the decision of the court below. The question as to whether evidence was improperly admitted was merely a possible trial error which it was incumbent upon petitioner to challenge by direct appeal. He cannot collaterally attack the judgment on such ground. *Birtch* v. *United States,* 173 F. 2d 316, 317 (C.A. 4), certiorari denied, 337 U.S. 944; *Dennis* v. *United States,* 177 F. 2d 195 (C.A. 4); *Losieau* v. *United States,* 177 F. 2d 919, 923 (C.A. 8); *Hurst* v. *United States,* 177 F. 2d 894, 895 (C.A. 10). Cf. *Price* v. *Johnston,* 125 F. 2d 806, 809, 811 (C.A. 9), certiorari denied, 316 U.S. 677; *Bozel* v. *Hudspeth,* 126 F. 2d 585, 587 (C.A. 10); *Howell* v. *United States,* 172 F. 2d 213, 215 (C.A. 4), certiorari denied, 337 U.S. 906.

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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